



September 26, 2001

Ms. Susan Combs
Commissioner
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR2001-4313

Dear Ms. Combs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152431. Your tracking number is TDA-PIR01-0232.

The Texas Department of Agriculture (the "department") received a request for all documents related to TDA Incident No. 2424-02-01-0029. You state that documents that have been previously disclosed or made available to potential respondents in the case or the general public will be released. You claim that the information in Exhibit B is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information¹.

Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.-Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. Open Records Decision No. 588 at 7 (1991).

¹You state that the submitted photographs are a representative sample of the photographs taken by the inspector in this case. We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You explain that the department is authorized to investigate pesticide-related complaints and may assess penalties for violations of chapter 76 of the Texas Agriculture Code. Agric. Code §§ 12.020, 76.1555(a). You also state that under the procedural section of the Agriculture Code, the department's actions are contested cases subject to the Administrative Procedure Act. *Id.* § 12.020(s). You state that the submitted information relates to an ongoing investigation into possible violations of state or federal pesticide laws for which litigation, in the form of a contested case, is anticipated. Based on your arguments and our review of Exhibit B, we conclude that you have shown that litigation is reasonably anticipated under section 552.103 and that Exhibit B relates to the anticipated litigation. Therefore, you may withhold the information in Exhibit B under section 552.103 of the Government Code.

However, our review of the submitted information indicates that one of the submitted documents was created by the potential respondent in the anticipated case. If the potential respondent has seen or had access to any of the submitted information, there would be no justification for now withholding that information from the requestor pursuant to section 552.103. Accordingly, any documents created by the potential respondent must be released to the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, we note that the applicability of section 552.103(a) ends when the likelihood of litigation is concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

To summarize, we conclude that, with the exception of the document created by the potential respondent in the anticipated case, the department may withhold the information in Exhibit B under section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 152431

Enc: Submitted documents

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(w/o enclosures)